No. 8779

IN THE

United States Circuit Court of Appeals

FOR THE 5

Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

WALKER RIVER IRRIGATION DISTRICT, A CORPORATION, et al., APPELLEES

PETITION FOR REHEARING

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TABLE OF AUTHORITIES CITED

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PETITION FOR REHEARING

Come now the appellees in the above-entitled matter and respectfully petition the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, for a rehearing on the following questions:

(a) Whether or not the Walker River Indian Reservation was created earlier than the year 1874, prior to which time there was no executive order creating the same, nor was there any order of the head of a department.

(b) Whether or not there was an implied reservation of water or any reservation of water for the lands embraced within the withdrawal order, irrespective of whether the reservation was legally created in 1859 or by executive order in 1874.

(c) Whether or not the court misapprehended the effect of the Winters decision as applied to the facts in the instant case.

(a) THE HEAD OF THE DEPARTMENT OF THE INTERIOR DID NOT ACT IN NOVEMBER, 1859, SO AS TO CREATE A VALID RESERVATION OF LAND AT THAT DATE.

It is respectfully submitted that the court inadvertently overlooked an important question of fact which was admitted by appellant, from which it follows that the resulting law, as announced, is erroneous.

We quote from page 7 and the top of page 8 of the printed opinion of the court:

> "It is conceded that on the basis of the action taken in November, 1859, the Walker River Indian Reservation was then established. The acts of the heads of departments are the acts of the executive. *Wilcox v. Jackson,* 13 Pet. 498, 513; *Wolsey v. Chapman,* 101 U. S. 755, 769. The subsequent proclamation of the President merely gave formal sanction to an accomplished fact. *No. Pac. Ry. Co. v. Wismer,* 246 U. S. 283; *Minnesota v. Hitchcock,* 185 U. S. 373, 389-390."

It is respectfully submitted:

1. That the court inadvertently erred in the statement that the appellees "concede that the Walker River Indian Reservation was established in 1859." The record throughout as well as the opinion and decision of the District Court clearly show that appellees always contend that the lands in the reservation were not

withdrawn from the public domain until the entry of the executive order of President Grant on March 23, 1874. The claim of appellees that the lands were not set apart from the public domain as a reservation finds support not only in the act of Congress of February 8, 1887 (24 Stats., 388-1 Kappler 33), but also by the Supreme Court of the United States in *Shoshone Tribe of Indians of the Wind River Reservation in Wyoming v. United States,* 299 U. S. 476-498; 81 L. Ed. 360. Only three methods are recognized by which an Indian Reservation can be created, namely:

1. By treaty.
2. By Act of Congress.
3. By executive order.

It can hardly be claimed that the letter of November 29, 1859, from the Commissioner of Indian Affairs to the Commissioner of the General Land Office legally set apart public lands for the Indians. No authority exists for the Commissioner of Indian Affairs or the Commissioner of the Land Office to set apart public lands for Indians or for any other reservations.

In *Shoshone Tribe of Indians of the Wind River Reservation in Wyoming v. United States,* 299 U. S. 476, 81 L. Ed. 360, decided by the Supreme Court on January 3, 1937, the Supreme Court overruled the decision of the court of claims holding that a letter written by the Commissioner of Indian Affairs in 1891 had the effect of taking from the Shoshone Indians a one-half interest in their reservation for the benefit of the Arapahoes.

The court must have inadvertently overlooked the admission of counsel for the appellant made during the oral argument before the Circuit Court of Appeals, when it was stated that the proof was lacking to show action by the Secretary of the Interior, who was the head of the department.

In the argument in support of the claim advanced by the United States that the Walker River Indian Reservation was created on November 29, 1859, counsel for the government was frank enough to admit that there was a hiatus in its proof in that the government (appellant) could not support its theory by any order, direction or act of the department head prior to the withdrawal or the creation of the reservation by Presidential order on March 19, 1874, but only through the letter of the Indian Commissioner. This failure of proof, we respectfully contend, is fatal to the appellant's theory that the lands involved (aside from its claim of implied reservation of water) were withdrawn in 1859. It will be noted that in the case of *Wilcox v. Jackson,* 13 Peters 498, 513, the Secretary of War acted in creating the reservation involved and not a subordinate officer. This case seems to be the leading case upon which the subsequent cases are predicated so that the language of the court should be noted as follows:

> "The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the War Department. Hence we consider the act of the War Department in requiring this reservation to be made, as being in legal contemplation, the act of the President; and,

> consequently, that the reservation thus made was in legal effect, a reservation made by order of the President, within the terms of the act of Congress."

Therefore, it is respectfully submitted that cases which follow and are predicated upon such language must refer to the head of the department, that is to say, the head of the War Department, the head of the Department of the Interior, etc.

In *Wolsey v. Chapman,* 101 U. S. 755, 769, referred to in this court's opinion, it will be noted that the Secretary of the Interior acted in the premises and approved the action taken with reference to the lands involved.

In each instance that was covered by the proof in the instant case, only subordinate officers of the Department of Interior acted, making the suggestions contained in the letters relied upon as the basis of the withdrawal. We doubt if anyone would contend that the Indian Agent, Dodge, or the Surveyor General for the Territory of Utah had the power to control the future policy of the government by making withdrawals, for it has been held that the Commissioner of Indian Affairs has no power to control the future policy of the government.

As was said in *Shoshone Tribe of Indians of the Wind River Reservation in Wyoming v. the United States,* 299 U. S. 476-498, 81 Law Ed. 360:

> "But the Commissioner of Indian Affairs was not empowered to fix the future policy of the Government, still less to exercise in its behalf the power of eminent domain."

The Commissioner of the General Land Office could exercise no greater power than could the Commissioner of Indian Affairs with respect to the creation of an Indian Reservation out of lands held in trust for all the people of the United States.

It will be noted that the case of *Wilcox v. Jackson,* supra, referred to by this Honorable Court on page 7 of the printed opinion, does not involve the act of a subordinate officer such as the Commissioner of Indian Affairs or the Commissioner of the General Land Office. It involves the act of the Secretary of War, which is one of the heads of the several departments of the government. We quote from the opinion:

> "At the request of the Secretary of War, the Commissioner of the General Land Office, in 1824, colored and marked upon the map this very section, as reserved for military purposes, and directed it to be reserved from sale for those purposes. We consider this as having been done by authority of law; for amongst other provisions in the act of 1830, all lands are exempted from preemption which are reserved from sale by order of the President. Now, although the immediate agent in requiring this reservation was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President."

Under the Act of July 9, 1832, Chapter 174, 4 Stat. 564, the Commissioner of Indian Affairs was acting under the direction of the Secretary of War. The jurisdiction over the Bureau of Indian Affairs was transferred to the Department of the Interior in the year 1849 (9 Stat. 395).

Even in the case of *Northern Pacific Railway Company v. Wismer,* 246 U. S. 283, it is clear that the agreement made by the Indian Department with the Indians in the State of Washington whereby a reservation was created was made with the full understanding of the Secretary of the Interior and acquiesced in by the head of the department by actually dealing with the Indians pursuant to such agreement and as the court said, "with full understanding of the situation." The court there held that even though there was no formal approval by the Secretary of the Interior, his conduct indicated such approval and knowledge.

> "* * * the Secretary of the Interior and the Commissioner of Indian Affairs approved the action of Colonel Watkins not later, certainly, than the sending of his report to the Senate on January 23, 1878, which was almost three years prior to the filing of the railroad company's plat,"

It will be particularly noted that an agreement existed with the Indians in the last mentioned case which is not present in the instant case. Here, the land was a part of the public domain without any right or claim to its occupancy by the Indians, as was the situation in all of the other cases cited in the court's decision; and it follows, therefore, that the same rules cannot be applied here as were applied in those cases.

(b) (c) THERE WAS NO IMPLIED RESERVATION OF WATER EITHER IN 1859 OR IN 1874 BASED UPON THE DECISION IN THE CASE OF WINTERS V. UNITED STATES, 207 U. S. 564, WHEN APPLIED TO THE CONTROVERTED FACTS IN THE INSTANT CASE.

From the opinion entered in this case it seems apparent that certain contentions made by Appellees have not been fully considered, or have been misapprehended. If those contentions are duly considered it would seem that this court's decision and order should be rendered in favor of Appellees and that the Appellant should be denied an 1859 priority, but should be allotted the priorities established by the lower court based on appropriation and application to beneficial use.

This court predicates its opinion upon the case of *Winters v. United States,* 207 U. S. 564, and other authorities following the Winters case involving the same factual situation as existed in that case.

It is earnestly contended by the Appellees that the Winters case, while correctly stating the law applicable to the peculiar facts of that case, has no application to the facts as presented by this appeal. Also, that several cases decided by this court and federal and state cases of this circuit have correctly established the law applicable to this case.

The Winters case, along with later cases involving like factual situations, is to be distinguished from the facts before this court for the following reasons:

1. The Indians had fundamental rights of occupation recognized in effect as property rights by the United States prior to the agreement between the United States and the Indians which resulted in the cession of certain of said land to the United States and a withdrawal and retention by the Indians of a smaller area for them-

selves. By the agreement or treaty with the Indians, the lands relinquished by the Indians became for the first time public lands freed from the restrictions of the reservation and subject to entry.

In every case cited by the court and by counsel for the Appellant, involving implied reservation of waters for use on Indian reservations, it is emphasized and re-emphasized that the reservation of waters was to the Indians arising out of the grant by the Indians to the United States of their lands. For example this court so stated in the case of *Skeem v. United States,* 273 Fed. 93 (C. C. A. 9, 1921).

We ask the privilege of re-emphasizing our reference to the Skeem case as the same appears at page 49 of our brief, and in order to demonstrate the point we are making we again quote from that case the following language:

> "First. The grant was not a grant to the Indians, but was a grant from the Indians to the United States, and such being the case all rights not specifically granted *were reserved to the Indians.* * * *." (Italics ours.)

See also *United States v. McIntire,* 101 Fed. (2d) 650, C. C. A. 9, 1939.

In this very same connection we feel that this court has confused the difference between a grant by the Indians, as in the Winters case, and a gratuitous voluntary grant by the Government to the Indians, such as in the instant case. We make this statement on account

of the fact that in discussing the Winters case this court, in paragraph (d), at the bottom of page 5 of the printed opinion, states as follows:

> "Treaties with the Indians and statutes disposing of property for their benefit have uniformly been given a liberal interpretation favorable to the Indian wards. * * *" Citing cases.

We respectfully submit that in the instant case there was neither a treaty nor a statute of Congress disposing of this property to the Indians.

So, the question of intent was to be determined from the terms of binding treaties by which the ignorant savages released all claims to large areas of lands in return for smaller areas on which they agreed to live. The implied reservation of water by necessary implication from these factual circumstances can have no application to the situation presented by the facts of this case.

The record before this court shows that in 1859, certain letters passed between certain subordinate officers of the Department of the Interior. The court has found from these letters and acts that there was no express reservation of the waters of the Walker River for the use of any Indians who might make their homes on the lands so set aside. There was, then, no ceding of lands by the Pahute Indians to the Appellant, by treaty, for the circumscribed area of the reservation set aside for their use. There was no grant by the Indians under such circumstances that a reservation of that which was not granted was, under ordinary prin-

ciples of law, reserved. If the Pahutes are now given an 1859 water right, it is by way of a grant to them and not by the theory of implied reservation as set out in the Winters and like cases. To imply a grant of these waters to the Indians in 1859 is to detract from the expressed dedication of Congress to the western pioneers in the acts of 1866 and 1877 of these same waters. To hold that these waters were granted to the Indians by the Appellant because of these acts of the officers of the Interior Department this court must not only infer that the public for which the United States held this land in trust was to be deprived of the use of this water, but also that it was intended to create an exception to the application of local laws to the obtaining of water rights based on local conditions and economic necessity.

(See *Taylor v. United States,* 44 Fed. (2d) 531; C. C. A.9.

In every case where the before-mentioned peculiar facts of the Winters and like cases were not involved the western Federal and State courts, including this Circuit Court, have held that merely by setting land aside for a particular purpose the United States did not grant or reserve water rights.

Krall v. United States, 79 Fed. 241 (C. C. A. 9, 1897).

United States v. Wightman, 230 Fed. 277, 284 (Ariz. 1916).

Larson v. Johnson, 23 Ariz. 360, 203 Pac. 874.

Kansas v. Colorado, 206 U. S. 46.

Byers v. "Wa Wa Ne," 86 Ore. 617, 169 Pac. 121.

Taylor, et al, v. United States, 44 Fed. (2d) 531 (C. C. A. 9, 1930), (Certiorari denied United States v. Taylor, 283 U. S. 820).

2. The lands involved in the Winters case were never affected by the acts of 1866 and 1877 because they were never a part of the public domain until the Ratifying Act of Congress of 1888; whereas, in the instant case, the upstream lands were always public domain and the white settlers' rights to the waters of Walker River were specifically recognized by the Acts of 1866 and 1877.

3. Indians have no right against the government.

In 1859 there was no deed, grant, law, treaty or prescriptive right or plain language evincing any color of title in the Pahute Indians to the waters of the Walker River. True, certain letters dealing with a proposed reservation for these Indians had passed between subordinate officers of the Department of the Interior, but these letters did not give the Indians any rights against the government that may now be enforced in their behalf.

United States v. Ashton, 170 Fed. 509 (Appeal dismissed, 220 U. S. 604).

The executive order of 1874 setting apart the land near Walker Lake as an Indian Reservation was effective only by reason of Congress having acquiesced by silence. Therefore, water should not be taken away

from one part of the public domain and given to another by mere implication.

Shoshone Tribe of Indians v. United States, supra.

United States v. Midwest Oil Co., 236 U. S. 459.

The express intent of Congress to hold the public lands as trustee for the white pioneers and to provide water for the settlers taking up those lands as is demonstrated by the Acts of 1866 and 1877, would seem to offset any implied intention to reserve those waters to Indians, except as and when they might appropriate and use the same.

Even assuming the reservation of land alone was effective in 1859, which we do not concede, in applying the test announced in the decision in the case of *Alaska Pacific Fisheries v. United States,* 248 U. S. 78, referred to in the court's opinion, page 3, we must find the following differentiations:

a. Circumstances in which Walker Lake Indian Reservation was created.

1. Indians were at war with whites. (br. 36).
2. Walker Lake and surrounding area was the source of Indian food (br. 36).
3. The purpose was to give emigrants protection and to preserve peace.
4. No lands had ever been cultivated by the Pahute Indians; they were a war-like nomadic tribe, and the idea of having them cultivate lands was an after-thought.

5. If the government had contemplated in 1859 that the Indians would support themselves by agricultural pursuits, they would have chosen a site for the reservation in one of the fertile upstream valleys. (Br. 36-37.)

b. Power of Congress.

Admitting, for the purposes of this argument, the power of Congress, it is to be considered that Congress did not act with regard to this reservation in 1874. As pointed out, the most that can be found is a silent acquiescence of Congress to the executive order. To find that from this silent acquiescence of Congress to the withdrawal of public lands from sale, there was a withdrawal of the water by implication is to disregard the fact that Congress was holding these same lands and waters as trustee for the public, and by inconsistent legislation not mentioning Indian reservations, had provided the sole means of acquiring vested interests in the waters of the western streams.

c. Location and character of lands.

As pointed out, these lands were not chosen for cultivation, otherwise other lands upstream, rather than at very end of a desert stream would have been selected.

d. Situation and needs of Indians and objects to be attained.

The object sought by the subordinate officers of the Department of Interior in setting this area aside, because of the then situation and needs of the Pahute Indians in Nevada was to preserve to the Indians the source of their natural food, a lake and 86,000 acres of hunting and fishing grounds, to keep out white trespassers and to preserve peace by offering the Indians an asylum of refuge. The purpose of putting the lands into cultivation came as an after-thought.

Even if it could be assumed that one of the objects in establishing the reservation was that the Indians were to make it productive with the aid of the government, it is not too unjust to the Indians to require them to exercise the same diligence in placing these lands under cultivation as was exercised by the pioneer whites. Especially when the government rendered them assistance and aid that was not rendered to the upstream whites. Thus, these Indians were not at a disadvantage when compared to the whites in bringing their lands under cultivation.

In the Winters case there was undoubtedly a great influx of people after the land was restored to the public domain who began to appropriate the waters of the several streams. Whereas, in the instant case, this was not Indian country, and the Indians had no recognized rights of occupancy in the territory, and the Indians had no rights other or different than any other settler upon the public domain, and the appropriation of the waters from the Walker River over a period of seventy-five years has been gradual, and the government during all of these years has had notice of the whites coming in from year to year and settling upon the lands and appropriating the water. During this period of time the government has actively aided the Indians in bringing their lands under cultivation, with the result that the Indians should be required to take their rights in the order of their priorities, as and when, from year to year, they have appropriated the waters.

The record is silent as to any requirement that any Indian was ever required to live on the reservation or make the reservation his home, as in the cases where treaties existed.

The upstream whites could not divert the waters without limit, but were bound to recognize any valid and bona fide appropriation made by the Indians with the invaluable assistance of the government.

That the government did not intend to reserve the waters in 1859 or in 1874 and that the acts of the subordinate officials of the Department of the Interior were not given that effect until very recently, affirmatively appears from the acts of the officers of this same Department of the Interior.

To shorten this petition for rehearing as much as possible, we respectfully refer ths court to the following pages of our brief, where this matter is discussed: pp. 51, 52, 53, 54, 61 and 67; and also to the very pertinent opinion of Judge Sawtelle in *United States v. Wightman*, 230 Fed. 277, 284, wherein it is stated:

> "The same officers of the government charged with the protection of the Indians also execute its land laws, for both are under the charge of the Secretary of the Interior, and his action in approving the sale of the land with water rights is of equal dignity and binding force on the government as the demand now made by his subordinate with his approval for the use of the waters by Indians * * *."

It is respectfully submitted that no implied reservation of water should attach as of the year 1859 or at

all by virtue of the letter of the Commissioner of Indian Affairs and that the rights of the Indians should be placed on a basis of appropriation the same as the white settlers. Neither party will suffer injuries under such a rule as conditions exist at this time.

Dated: July 1, 1939.

William M. Kearney,
Edward F. Lunsford,
Myron R. Adams,
George L. Sanford,
William H. Metson,
Robert Taylor Adams,
Solicitors for Appellees.

The undersigned counsel for appellee hereby certify that the foregoing petition is presented in good faith and not for delay.

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